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Supreme Court of the United States

June Term, 1940

JOSEPH J. MASCUCH,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

No. 1058 116

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Notice of Filing.

Supreme Court of the United States

June Term, 1940

JOSEPH J. MASCUCH,
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UNITED STATES OF AMERICA,
Respondent.

No. .....

Sir:

PLEASE TAKE NOTICE that in the above entitled cause a petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, and brief in support thereof, a true copy of which is annexed, together with the requisite copies of the printed record, were filed in the office of the Clerk of the Supreme Court of the United States on the day of May 1940, and are now pending before the Court.

New York, N. Y., May 27th, 1940.

Yours, etc.,

HARRY W. COLMERY,
Topeka, Kansas,
FRANK L. MILLER,
70 Pine Street,
New York, N. Y.,
Counsel for Petitioner.

To:
Hon. FRANCIS BIDDLE,
Solicitor General,
Washington, D. C.

Service of a copy of the foregoing notice and of the within petition for writ of certiorari and supporting brief, as well as of a copy of the printed record (including the proceedings in the United States Circuit Court of Appeals for the Second Circuit), is hereby admitted this day of May, 1940.

Counsel for Respondent.

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No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice of the Supreme Court of the United States and Associate Justices thereof:

Your petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, which decision was rendered on the 6th day of May, 1940, affirming the judgment of conviction of the United States District Court for the Southern District of New York at the Borough of Manhattan, City and State of New York, convicting the petitioner of perjury, in violation of Title 18, United States Code, Section 231.

Statement of the Matter Involved.

Petitioner, President of Breeze Corporations, Inc., a company engaged since 1926 in the manufacture and distribution of aeroplane parts and equipment, riot guns, tear

gas and other related products, a good portion of which it sells to the United States Government Army and Navy Air Corp. (R. 579), with an annual payroll amounting to approximately $1,000,000 (R. 583), having between 1,500 and 1,700 stockholders (R. 321) and whose stock is listed upon the New York Curb Exchange, was heretofore and on the 14th day of June, 1939 indicted on two counts, charged with having committed perjury in violation of Section 125 of the Criminal Code (18 U. S. C. A., Sec. 231) in an investigation conducted by the Securities and Exchange Commission involving transactions in Breeze Corporations, Inc. stock upon the New York Curb Exchange during the period between October 1st, 1938 and March 25th, 1939. The alleged perjurious testimony almost entirely related to matter antedating that fixed period.

Petitioner went to trial herein on November 14th, 1939 and was convicted on November 29th, 1939 on both counts of the indictment. He was sentenced to imprisonment for two years and to pay a fine of $2,000 on each of the two counts of the indictment, the prison sentences on both counts to run concurrently.

Petitioner appealed from the judgment of conviction to the United States Circuit Court of Appeals for the Second Circuit which resulted in a unanimous affirmance with opinion by SWAN, C. J.

Upon the trial, petitioner attacked for insufficiency each assignment of perjury in both counts by moving for a direction and dismissal both at the close of the Government's and the entire case. The application was in all respects denied (R. 482-520; 638-640). Notwithstanding, that the application was treated by both Court and counsel as a motion for the withdrawal of said assignments from the consideration of the jury and that the Circuit Court in its discretion might have regarded it as such, the Circuit Court

held it would not regard the motion so made as equivalent to a motion to withdraw.

During the course of the trial, substantial legal questions were raised by petitioner and by reason of their rejection, reversible error was committed as follows:

Petitioner offered in evidence Defendant's Exhibit A for Identification (R. 927). The rejection of that document prevented petitioner from presenting to the jury for its consideration, evidence of absence of wilful intent to swear falsely by the offer in that document to correct his testimony. It served to deprive petitioner of an opportunity to corroborate the witness Palmer called by the defense and who gave direct positive evidence as to the making of the agreement set out in the document. The rejection was particularly grievous in that the Government had been given wide latitude on that score and petitioner should have been accorded an opportunity to show subsequent acts and declarations as bearing on the important element of intent.

Several of the character witnesses called by the defense were cross examined over objection and exception upon collateral and irrelevant matter which in nowise was related to defendant's reputation for truth and veracity (R. 293-569; 575). In one instance, the Government having opened a new field of inquiry on cross examination sought to impeach the character witness by producing and reading into evidence portions of that witness's testimony given before the United States Grand Jury (R. 523-536).

Upon cross examination (R. 589-634) of the witness Palmer, called by the defense, the Government, over objection and exception and the Trial Court's admonition that the course was dangerous, was permitted to develop upon the claim that such testimony would affect the witness's credibility, a line of inquiry which failed to discredit the

witness but which imputed both to the defendant and said witness the commission of other crimes and offenses.

During the course of the trial there was comment by juror No. 4 which the Trial Court labelled improper. Petitioner urged that the usefulness of that juror, particularly following questioning and admonition by the Court, had been impaired to the extent that petitioner could not receive a fair trial by an impartial jury, yet his motion for the withdrawal of a juror and a mistrial was denied (R. 267-275).

Upon the trial, evidence was given by both sides respecting the making of an agreement between petitioner's counsel and the Securities and Exchange Commission Examiner whereby defendant would be accorded the right to examine the transcript of his testimony (upon which this perjury indictment is based) for the purpose of correcting errors, inaccuracies or omissions before he became bound thereby. Although the examiner who testified for the Government denied the making of the agreement, the evidence, as bearing upon the element of intent, offered by both sides was submitted to the jury. Upon this issue, at petitioner's request the Court charged in substance (R. 706) that if they found such an agreement or stipulation to have been entered into, and that the defendant believed such right existed and that if he gave his testimony in good faith in reliance thereon, he was entitled to an acquittal. But the Court refused to charge its corollary, viz., that even if the jury found that no agreement or stipulation such as claimed by the defendant was entered into but the other circumstances existed and were found, then the defendant was entitled to an acquittal. This was tantamount to an instruction to the jury that before they could acquit the defendant notwithstanding the absence of corrupt motive and wilful intent, they must find as a fact the existence of the agreement granting the defendant the right to correct his testimony.

The refusal of the Trial Court to charge as requested (R. 701) to the effect that evidence of the defendant's good character of itself, if believed by the jury, is sufficient to create a reasonable doubt where otherwise no reasonable doubt would exist, was, as your petitioner shall demonstrate in the supporting brief, reversible error but the Court's main charge (R. 721) was tantamount to an instruction that evidence of good character must outweigh the positive evidence in the case to entitle petitioner to the benefit of any reasonable doubt which might thereby be created. Over objection and exception, the Trial Court permitted evidence of petitioner's acts and declarations after the date fixed in the indictment wholly unrelated to the crime charged and which imputed to the petitioner the commission of other crimes.

Your petitioner respectfully submits that the foregoing errors are not only serious, substantial and prejudicial but have had the cumulative effect of depriving your petitioner of a fair trial by an impartial jury in violation of petitioner's constitutional rights which ought to be reviewed by this Court.

Questions Involved.

(1) Did the Circuit Court err in affirming the judgment of conviction?

(2) Did the Circuit Court err by its refusal to exercise its discretion and treat the motions for dismissal and direction as motions for withdrawal?

(3) Does the erroneous submission of any one assignment of perjury in each of the counts of the indictment require a reversal of the conviction?

(4) Was the defendant deprived of a fair trial by an impartial jury by reason of (a) the refusal of the Trial Court to charge as requested respecting the probative effect of evidence of good character, (b) the improper and prejudicial cross examination of character witnesses called by petitioner, (c) the improper and prejudicial cross examination of the witness Palmer called by petitioner, (d) failure of the Trial Court to charge as requested by petitioner respecting criminal intent and corrupt motive notwithstanding a negative finding by the jury as to the making of the agreement reflected in the Defendant's Exhibit A for Identification, (e) the circumstantial evidence and testimony by inference of petitioner's subsequent acts and declarations, imputing to petitioner the commission of other unrelated crimes, permitted over objection and exception, and (f) the misconduct of juror No. 4, labelled improper by the Trial Court?

Assignment of Errors.

It is respectfully submitted that the Courts below erred by giving in effect negative answers to each and every one of the questions formulated in the preceding paragraph.

Statute Involved.

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years."

Reasons for Granting the Writ.

(1) The Circuit Court below by affirming the judgment of conviction, sanctioned the Trial Court's charge, and its failure to charge, as requested by petitioner, on the question of probative effect of evidence of defendant's good character which is

a. in direct conflict with the decision of this Court—*Edgington* v. *United States,* 164 U. S. 361, and

b. in direct conflict with the decisions of the other circuits on the same matter, viz., *Roth* v. *U. S.* (6th Circuit) 294 Fed. 475; *Snitkin* v. *U. S.* (7th Circuit) 265 Fed. 489; *Egan* v. *U. S.,* D. C., 287 Fed. 958, although it is supported by *Kreiner* v. *U. S.* (2nd Circuit) 11 Fed. (2d) 722; *Kaufman* v. *U. S.* (3rd Circuit) 282 Fed. 776; *Grace* v. *U. S.* (5th Circuit) 4 Fed. (2d) 658; *Warren* v. *U. S.* (8th Circuit) 250 Fed. 89, and *Joyce* v. *U. S.* (9th Circuit) 294 Fed. 665.

(2) This conflict presents in and of itself an important question of Federal Criminal Law which should be settled by this Court.

(3) The holding by the Circuit Court of Appeals in and for the Second Circuit (*Kreiner* v. *U. S.* (*supra*)), "that evidence of the defendant's good character in and of itself, if believed by the jury, is not sufficient to create a reasonable doubt where otherwise no reasonable doubt would exist", is in conflict with the applicable local [New York] decisions (*People* v. *Marcus,* 236 A. D. 93; *People* v. *Gilbert,* 199 N. Y. 10; *People* v. *Millard,* 247 A. D. 253; *People* v. *Ulman,* 258 A. D. 262; *People* v. *D'Anna,* 243 A. D. 259) and thus calls for an exercise of this Court's power of supervision in

accordance with the doctrine announced in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

(4) The Circuit Court departed from the accepted and usual course of judicial proceedings, sufficient to call for an exercise of this Court's power of supervision, when it refused to exercise its discretion and treat the motions of petitioner for direction and dismissal at the close of the Government's and entire case, as motions for withdrawal, particularly since it appears that counsel and the Trial Court treated them as such, in arguing said motions addressed to each and every specific assignment of perjury in each of the two counts. The Circuit Court's failure to do so constitutes an abuse of discretion. Section 269, Judicial Code, 28 U. S. C. Section 391; *Crawford* v. *U. S.,* 212 U. S. 183.

(5) The Trial Court's rejection of Defendant's Exhibit A (R. 927) for Identification deprived the petitioner, among other things, of a fair trial, for he was prevented from presenting for the jury's determination, evidence of absence of wilful intent to swear falsely through the offer by said document to correct his testimony. The denial of that right is in conflict with the applicable decision of this Court. *U. S.* v. *Norris,* 300 U. S. 564. It likewise deprived defendant of an opportunity to corroborate the witness Palmer. *Peo.* v. *Epstein,* 245 N. Y. 234. In addition, since the Government was given wide latitutude on that score, defendant should have been permitted to show subsequent acts and declarations as bearing on the question of intent. *Shreve* v. *U. S.,* 103 F. (2) 796.

(6) The Trial Court by denying petitioner's motion for the withdrawal of a juror and declaring a mistrial by reason of comments of Juror Number 4, which the Trial Court labelled improper, deprived your petitioner of his constitu-

tional rights to a trial by an impartial jury by reason of such misconduct (R. 267-275). *Sunderland* v. *U. S.*, 19 Fed. (2d) 202, 212.

(7) The defendant was not granted a fair and impartial trial in that the Trial Court permitted (a) grossly improper and prejudicial cross examination of character witnesses, *Sloan* v. *U. S.*, 31 Fed. (2d) 902; *Pittman* v. *U. S.*, 42 Fed. (2d) 793, (b) the cross examination, over objection and exception of petitioner, of the witness Palmer which related to separate, distinct, disconnected and irrelevant matter, and while permitted on the Government's claim that the testimony was for the purpose of affecting the credibility of the witness, the effect thereof was highly prejudicial in that there was a complete failure to discredit the witness yet there was imputed both to the defendant and said witness the commission of a crime not mentioned or described in the indictment, *Gart* v. *U. S.*, 294 Fed. 66; *Manning* v. *U. S.*, 287 Fed. 800, (c) having granted petitioner's request to charge No. 32, committed error by its refusal to charge request No. 31 as the corollary thereof, since the combined effect of the charge and refusal was to instruct the jury substantially that even if petitioner believed that he had a right to correct his testimony and gave his testimony in good faith and in reliance thereon, all of which would negative the criminal intent and corrupt motive which are essential ingredients of the crime of perjury, the jury must nevertheless convict if they found as a fact that the agreement claimed was not entered into, and (d) evidence of defendant's conduct subsequent to the date of the alleged commission of the crime which was highly prejudicial and tended to inflame the jury since it imputed the commission of other crimes unconnected with the crime charged in the indictment. *Gordon* v. *U. S.*, 254 Fed. 53; *Weil* v. *U. S.*, 2 Fed. (2d) 145.

WHEREFORE, your petitioner respectfully prays that this petition for a Writ of Certiorari to review the judgment of the Circuit Court of Appeals herein be granted.

Dated: New York, N. Y., May 27th, 1940.

JOSEPH J. MASCUCH,
Petitioner.

by HARRY W. COLMERY,
Office & P. O. Address,
Topeka, Kansas,

FRANK L. MILLER,
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Borough of Manhattan,
City of New York,

Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is not yet reported but will be found annexed to the transcript of record.

There was no opinion by the United States District Court for the Southern District of New York.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered May 6th, 1940.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended.

Statement of the Case and Specification of Errors.

The statement of the case and the specification of errors are contained in the petition.

ARGUMENT.

I.

Petitioner was entitled to the charge as requested, relating to the probative effect of evidence of good character.

By the main charge (R. 721), the jury was instructed as follows:

> "In this case we have had a number of so-called character witnesses who testified as to the reputation of the defendant for truth and veracity. Such evidence is not in and of itself sufficient to raise a rea-

> sonable doubt in your minds. It must be believed by you in order to raise a reasonable doubt. Testimony of good character may create a doubt against the positive evidence only when it is the judgment of the jury that the character is so good as to raise a doubt of the truth of the positive evidence. If you find such to be the case, then a reasonable doubt would exist in your minds and your verdict should be one of acquittal. THE FACT THAT A PERSON HAS BORNE A GOOD REPUTATION PRIOR TO THE TIME HE WAS ACCUSED OF A CRIME SHOULD NOT BE USED BY THE JURY AS A REASON FOR SHOWING LENIENCY TO ONE WHOSE GUILT HAS BEEN ESTABLISHED BY THE POSITIVE EVIDENCE BEYOND A REASONABLE DOUBT."

Petitioner excepted to the Court's refusal and failure to charge request No. 6 (R. 701) as follows:

> "6. Evidence of the defendant's good character may be considered by you with the other evidence in the case and may in connection therewith be sufficient to raise a reasonable doubt in your mind as to the guilt of the defendant.
>
> or
>
> That evidence of defendant's good character is in the same category as other factual evidence and must be considered by you in your deliberations. It may, of itself, if believed by you, create a reasonable doubt where otherwise no reasonable doubt would exist."

This was assigned as error (R. 978). The Court's charge was tantamount to an instruction to the jury that evidence of good character must outweigh the positive evidence in the case before petitioner would be entitled to the benefit of the probative effect of evidence of his good character.

We know of no case which has extended the rule to this extent. This very Court has declared:

> "Whatever may have been said in some of the earlier cases, to the effect that evidence of the good

> character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing." *Edgington* v. *U. S.*, 164 U. S. 361.

While the various Circuits are in direct conflict on this subject (see pp. 7-8, *ante*), there is no question but that the local (New York) applicable decisions support the petitioner's claim that the refusal to charge as requested, deprived him of a substantial right and a fair trial.

In *People* v. *Ulman*, 258 A. D. 262, 263, it was said:

> "Moreover, it is the law that evidence of good character may of itself create a reasonable doubt when without it none would exist. (*People* v. *Conrow*, 200 N. Y. 356; *People* v. *Bonier*, 179 id. 315, 321; *People* v. *Elliott*, 163 id. 11; *People v. Slaughter*, 253 App. Div. 802 (dissenting opinion by Martin, P. J.); revd., 278 N. Y. 479.)"

To the same effect, cases cited page 7, *ante*.

II.

Grievous and prejudicial error was committed by the Trial Court in its refusal to charge as requested by petitioner on the question of absence of willful intent and corrupt motive.

As already indicated, pages 4-5, *ante*, the petitioner urged as a defense that during the course of the Securities and Exchange Commission inquiry, an agreement was en-

tered into between his counsel and the Commission's Examiner by which the petitioner was to be accorded the right to examine the transcript of his testimony for the purposes of correcting errors, inaccuracies or omissions before he become bound thereby. The evidence as bearing upon the element of intent and offered by both sides was submitted to the jury.

In the main charge (R. 723) the jury was instructed:

> "One of the defenses urged here is that on the examination it was agreed by the examiner before any testimony was taken that the defendant was to have an opportunity to see a copy of his testimony so that he might check it for errors before he was bound by it. The witness Palmer testified to such an arrangement. The examiner denied any such arrangement. The examiner would have no authority to agree that the witness would not be bound by his testimony until he had an opportunity to examine the record • • • Whether there was such an agreement or whether there was not, the guilt of the defendant depends upon whether he gave false testimony wilfully in violation of his oath."

Upon this issue, petitioner excepted to the Court's refusal and failure to charge request No. 31 (R. 727) as follows:

> "31. That even if the jury finds that no agreement or stipulation was reached between Mr. Palmer and Mr. Murphy granting defendant the right to correct testimony before becoming bound thereby, they may nevertheless find that the defendant believed such right existed and if he gave his testimony in good faith in reliance thereon, they should take that in consideration in determining criminal intent and corrupt motive and in that event, the defendant should be acquitted."

This was assigned as error (R. 982). The irreparable damage and prejudice occasioned to petitioner lies in the fact that while the Court refused to charge as above, it did instruct the jury in accordance with request No. 32 (R. 728) in the following language:

> "If the jury finds that such an agreement was made between Mr. Murphy and Mr. Palmer and defendant gave testimony thereunder in good faith, you must acquit him."

Since criminal intent alone is the crux of the case, the combined effect of the charge and refusal to charge on that score as requested was tantamount to an instruction to the jury that before they could acquit the defendant, even if they found absence of corrupt motive and willful intent, they must first find as a fact that the agreement granting petitioner the right to correct his testimony was actually entered into. This, we submit, had the effect of either negating the Court's main charge respecting the question of criminal intent or served at least to confuse the jury on this all important question. Beyond this, the refusal to charge request No. 31 left the jury without instruction on an important element of the Government's case as well as the defense's contention. Manifestly, this was substantial error and highly prejudicial to the petitioner.

III.

The rejection of Defendant's Exhibit A for Identification deprived the defendant of the right to present to the jury competent and relevant evidence bearing upon his defense.

Defendant's Exhibit A for Identification (R. 927), never repudiated nor answered (R. 67 and 585), which

alluded to the making of the agreement referred to in the preceding point, was rejected by the Trial Court not as immaterial but rather as a self-serving declaration.

The witness Palmer gave direct positive evidence as to the making of that agreement (R. 549, 550). Among other things, the letter was offered as corroboration of such evidence. The Trial Court at the outset was inclined to receive it (R. 563, 564) and conceding the importance of the document, ordered an adjournment (R. 565) but on resumption of the trial, rejected it (R. 567).

The record discloses that the letter was offered not as proof of the statements therein contained but to establish (1) corroboration of the witness Palmer (see *People* v. *Epstein*, 245 N. Y. 234) and (2) an offer to correct petitioner's testimony as bearing on the question of intent. This Court, in *U. S.* v. *Norris*, 300 U. S. 564, 576, declared:

> "This is not to say that the correction of an innocent mistake, or the elaboration of an incomplete answer, may not demonstrate that there was no wilful intent to swear falsely."

This is a plain indication that an effort to correct a mistake or to elaborate an incomplete answer may suffice to demonstrate the absence of a wilful intent to swear falsely.

Bearing in mind that one of the assignments of perjury in the second count of the indictment specifically relates to the matter petitioner offered to correct by this document, the prejudicial character of the exclusion becomes manifest.

It might also be noted that the Government was given wide latitude respecting the introduction of evidence of defendant's acts and declarations after the date fixed in the indictment, as bearing on the question of intent (R. 223-226; 378; 439-453). Petitioner was entitled to at least the same latitude. In *Shreve* v. *U. S.*, 103 Fed. (2d) 796, 803, the Court said:

> "Intent is a state of mind difficult of precise proof and, therefore, evidence of other and surrounding circumstances may be received for the purpose of proving such intent. Acts done and declarations made after the act of which the defendant is accused are admissible as bearing on intent. Kulp v. United States, 3 Cir., 210 F. 249, 251. See also Samuels v. United States, 8 Cir., 232 F. 536, 541, 542, Ann. Cas. 1917 A. 711; Greenleaf on Evidence, 16th ed., vol. 3, Section 15, p. 21; Jones, Comm. on Evidence, 2d ed., vol. 2, Section 624, p. 1160, Section 632, p. 1175; Zoline's Fed. Crim. Law & Proc., vol. 1, Section 358, p. 297-298. Interesting academically are Wigmore, The Science of Judicial Proof, 3d ed., Section 119, p. 219, and Holmes, The Common Law, p. 53."

Another basis upon which the letter was admissible, is succinctly stated in 16 C. J. 571:

> "Evidence is sometimes admitted, or its admission is held not error, on the ground that similar evidence has been introduced, or proof of the same character has been made, by the adverse party. This is but common fairness."

It cannot be too strongly urged that depriving petitioner of the opportunity to present the letter to the jury for its consideration as corroboration of positive evidence and on the question of intent by the offer to correct, was highly prejudicial.

IV.

Petitioner was entitled to a mistrial as a result of the conduct of juror No. 4, which the Trial Court itself labelled "improper".

A reading of the Record (pp. 267-275) discloses that the conduct of juror No. 4 was improper. The Court had occasion to observe: "I do not approve of the conduct of

this juror * * *" (R. 270), and in the presence of the jury, added (R. 275):

> "Now, this has been an unfortunate incident in the course of this trial, and I have denied a motion for mistrial. Although I think the comment was improper and I am not condoning it, nevertheless, I do not think it goes to the extent of justifying a mistrial."

A reading of the colloquy between Court and counsel (R. 268-275) must lead to the irresistible conclusion that the usefulness of the juror complained of, was entirely impaired and that at his hands the defendant could not obtain his constitutional right to a trial by an impartial jury. The Record is indicative, likewise, of prejudgment or bias on the part of said juror. Since the incident occurred at the very outset of the trial, in the interests of justice, a mistrial should have been declared.

As was said in *Sunderland* v. *U. S.*, 19 Fed. (2d) 202, 212:

> "The least that can be said about this misconduct of one of the jurors is that it raises a grave doubt whether the constitutional right of plaintiffs in error to a trial by an impartial jury was not infringed."

V.

It was error for the Circuit Court below to refuse to treat the motions for dismissal and direction as motions for withdrawal, since upon this record the evidence was insufficient to support at least one assignment of perjury in each count of the indictment.

It is now well settled that where several assignments are submitted to a jury under one count of an indictment, and any one of those assignments is not supported by the evidence and should have been dismissed, a conviction on that count cannot stand.

People v. *Clarke*, 252 A. D. 122;
Wood v. *People*, 59 N. Y. 117;
People v. *Henry*, 196 A. D. 177;
People v. *Root*, 94 A. D. 84.

Mindful of the rule that "insufficient evidence is, in the eyes of the law, no evidence" (*Matter of Case*, 214 N. Y. 199, 203), an examination of the Record herein discloses that at least one assignment in each of the counts is not supported by the evidence, so that it cannot be determined upon which assignment in said counts the petitioner was found guilty.

In the interest of brevity, no attempt will be made to review each assignment of perjury in both counts although attention is respectfully directed to the motion to dismiss (R. 482-520) where each and every assignment was treated and discussed separately. Suffice it to say that Assignment A of Count 1 centers upon petitioner's ownership of stock. The Government's case hinges upon petitioner's alleged beneficial ownership of stock in the name of several friends and employees. The Record discloses that petitioner's

answers to the questions propounded in this connection were not only literally true, but from the context, the questioning, it appears, was directed to petitioner's record ownership as distinguished from alleged beneficial ownership (R. 749, 750). The charge was based upon petitioner's alleged false testimony that he owned "approximately" 90,000 shares of stock. It is conceded that this figure represents the extent of petitioner's legal and record ownership. The Government contended that petitioner had an equitable interest in approximately 20,000 additional shares owned by others and registered in those names. It appeared affirmatively upon the Government's case that out of such additional 20,000 shares, allegedly beneficially held, one-half or 10,000 thereof were treated, regarded and labelled as belonging to a person other than defendant (R. 229). In any event, it is patent that the examiner failed to inquire of petitioner whether he had a beneficial interest in that stock (fol. 2247, R. 749; fols. 2251-2, R. 751).

The attention of the witness not having been called to the precise fact concerning which the perjury is charged and the questions intended to elicit information having been inadequately framed, the testimony as charged in the indictment differs materially from the testimony given, which although literally true, is perhaps not frank. This is entirely insufficient to support a conviction for perjury.

U. S. v. *Slutzky*, 79 Fed. (2d) 504;
People v. *Criscuoli*, 164 A. D. 119;
People v. *Gillette*, 126 A. D. 665;
U. S. v. *Otto*, 54 Fed. (2d) 277.

Similarly, with respect to Assignment C of Count 2 of the indictment, there was no substantial evidence adduced in support thereof, by the Government. The Record (Government's Exhibit 2, R. 746) indicates that this matter re-

lates to petitioner's own opinion as to whether he violated Section 9(a)(2) of the Securities and Exchange Act of 1934 and was elicited by questions propounded by his own counsel at the close of the Commission's inquiry. The truth of his negative answer to the question thus propounded, was at no time disputed or put in issue by any evidence adduced by the Government. The Government contented itself with a mere showing that the petitioner had effected some transactions in the stock but there was nothing to establish by direct proof, inference or otherwise, that such transactions were fictitious, manipulative or in violation of the statute in question.

One's opinion as to whether he violated the law can neither be material to an investigation nor sustain a perjury conviction.

> *State* v. *Henderson*, 90 Ind. 406;
> *People* v. *Woolverton*, 8 Blackf. 452;
> *Rex* v. *Crespigny*, 1 Esp. 280;
> *Commonwealth* v. *Brady*, 5 Gray (Mass.) 78.

The Circuit Court below in holding that petitioner failed to ask the Trial Court to withdraw from the jury any specific assignment of perjury and thus making unavailable to him upon the appeal the contentions hereinabove urged, was error.

A reading of the motion for dismissal of the indictment and direction of the verdict (R. 483-520) in which each and every assignment of perjury in both counts was separately considered and argued, discloses that the motion was treated not only by counsel but by the Trial Court as one for the withdrawal from the jury's consideration of each and every specific assignment of perjury.

Upon a reading, the authorities, *U. S.* v. *Dilliard*, 101 Fed. (2d) 829, 833, and *Claassen* v. *U. S.*, 142 U. S. 140, 147,

cited and relied upon by the Circuit Court of Appeals, are found to be neither in point nor controlling here.

It is respectfully submitted that the Circuit Court of Appeals, in the interests of justice, should have exercised its discretion and treated the motion as one to withdraw. Its failure to do so constituted an abuse of discretion. *Crawford* v. *U. S.*, 212 U. S. 183.

VI.

The cumulative effect of the improper and prejudicial cross examination of character witnesses, cross examination of the witness Palmer and admission of circumstantial evidence and testimony by inference of petitioner's subsequent acts and declarations, imputing to petitioner the commission of other unrelated crimes, over objection and exception, was to deprive petitioner of his constitutional right to a fair trial.

No useful purpose will be served in reviewing the Record at length. Sufficient has heretofore been indicated (pp. 3, 9, *ante*) concerning the grossly improper and prejudicial cross examination of witnesses and character witnesses over petitioner's objection and exception.

The same may be said of the evidence of petitioner's conduct subsequent to the date of the alleged commission of the crime which likewise was highly prejudicial and tended to inflame the jury since it imputed to petitioner the commission of other crimes unconnected with the crime charged in the indictment.

Under the authorities cited, upon page 8, *ante*, it is respectfully submitted that petitioner did not obtain a fair trial and is thus entitled to a new trial.

Conclusion.

It is respectfully submitted that the petition should be granted as prayed for.

Dated: New York, May 27th, 1940.

Respectfully submitted,

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FRANK L. MILLER,
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1940.

No. 116

JOSEPH J. MASCUCH, *Petitioner,*

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF IN BEHALF OF PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF IN BEHALF OF PETITIONER

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 989-991) is now reported in 111 F. (2nd) 602.

ARGUMENT.

I.

The Government resists the Petition herein by reliance in the main, upon the theory that "petitioner is precluded" from urging in this Court such matter "not argued in the Circuit Court" (p. 2), and cites as authority *Helvering* v. *Wood,* No. 384, 1939 Term, decided February 26th, 1940. Upon a reading, that case is found to be neither in point

nor controlling here, for there, as distinguished from the case at bar, the matter sought to be raised in this Court for the first time, was not only expressly waived in petitioner's brief before the Circuit Court, but was not included in the assignments of error.

This Court on that score had occasion to comment:

> "For a wholly different reason, petitioner's argument based on § 22(a) must fail. The Board of Tax Appeals purported to place its decision solely on § 166 and § 167 of the Act. Petitioner in his assignments of error specifically mentioned only § 166 and § 167, not § 22(a). In his brief before the Circuit Court of Appeals petitioner expressly waived reliance upon any section other than § 166. Though petitioner in his petition for certiorari relied on § 22(a), respondent in opposition thereto took the position that that point was not available to petitioner here as it was not raised below. In view of these facts, especially the express waiver below, we do not think that petitioner should be allowed to add here for the first time another string to his bow" (*Helvering* v. *Wood, supra*).

Each and every point herein urged was assigned by petitioner as error in the Court below, viz., Point I, R. 978; Point II, R. 982; Point III, R. 939, 967; Point IV, R. 954; Point V, R. 976 and Point VI, R. 944, 952, 953, 963, 969-975.

Whether the matter was argued in the Court below is not the criterion. The assignment thereof as error furnishes the true test. As was said by this Court in *Sonzinsky* v. *United States,* 300 U. S. 506, 514:

> "We do not discuss petitioner's contentions which he failed to assign as error below."

To the same effect, *Saltonstall* v. *Birtwell,* 164 U. S. 54, 71.

II.

Petitioner's contentions urged under Point V (Br. 19) of his main brief, are entirely misconstrued by respondent.

Contrary to the Government's claims at page 5 of its brief that "in this connection petitioner asserts that the evidence failed to prove Assignment A of the first count and Assignment C of the second Count", petitioner upon his main brief argued that each assignment of perjury in both counts was not supported by the evidence and respectfully directed attention to his motion to dismiss (R. 482-520), where each assignment was separately treated and discussed as to insufficiency. It was only "in the interest of brevity" that "no attempt" was "made to review each assignment of perjury in both counts", since it sufficed for the purposes of the point under discussion, to demonstrate that any one assignment in each count was not supported by the evidence.

For like reason, there is hardly any justification for the claim upon page 7 of the Government's brief that petitioner "does not argue that there existed a failure of proof as to all of the assignments of perjury in each count, but merely that a particular assignment in each count was not established."

We agree with respondent that under the general rule, it is not necessary to support all the assignments in any given count of an indictment, to sustain such count. Obviously therefore, where a count contains several assignments and the prosecution sustains but one, the count as such cannot be dismissed. It would be encumbent upon the Court to sustain the count and submit for the jury's consideration the question of defendant's guilt on the sustained assignment contained in the count, withdrawing simul-

taneously those assignments which are not supported by the evidence.

This principle cannot be in conflict with the rule urged by petitioner, that the failure to withdraw from the jury's consideration those assignments in a given count which are unsupported by the evidence, requires a reversal of conviction on that count, since it cannot be determined upon which of the assignments in the count petitioner was found guilty.

In the case at bar, it may very well be that petitioner was convicted exclusively upon Assignment A of the first count and Assignment C of the second count, matters which among others, the Government failed to sustain beyond a reasonable doubt.

Rule and reason combine to prove such iniquity.

In *People* v. *Clarke*, 252 App. Div. 122, 124 (1937), it was said:

> "Since under the indictment, containing a single count, it can not be known upon which of these seven alleged statements the jury found the defendants to be guilty, the People, to sustain the conviction, are bound to maintain, and do maintain, that all the statements charged to have been false constituted statements of fact as distinguished from expressions of opinion. It follows that if one of the statements submitted to the jury as justifying the conviction of the defendants was merely the expression of an opinion not constituting any crime, then the judgment must be reversed, since the jury may have convicted the defendants exclusively on that ground."

III.

Respondent does not dispute the existence in the various Circuits of a conflict in the Federal Criminal Law, relating to the probative effect of evidence of defendant's good

character (Pet. Br. 7), justifying and requiring determination with finality by this Court.

But it is ingeniously sought to overcome the force of petitioner's point, by charging that:

> "petitioner neither excepted to the charge nor assigned error with respect thereto (R. 724-728, 939-983), and, consequently, he is not in a position now to complain thereof" (Resp. Br. 10).

It is to be noted that the error complained of and assigned (R. 978) was the failure and refusal of the Trial Court to charge as requested (R. 701), and this suffices to preserve for petitioner his right to assign error.

As was said in *Block* v. *United States,* 261 Fed. 321, 325:

> "If the plaintiff in error was dissatisfied with the charge, because of omitted matter, his remedy was to request the court to charge upon the matter omitted. It could not be reached by an exception."

Indeed, under Rule XXIV of the General Rules of the Southern District Court of New York, it is required that:

> "Prior to summing up in any jury trial, counsel must submit to the Judge in writing all requests for instructions. The Judge may, in his discretion, refuse to consider any request submitted too late under the foregoing provision."

This rule is obviously intended to call the Trial Court's attention to any possible error in the prospective charge and thus afford an opportunity for timely correction.

Under these circumstances, it is respectfully submitted that no exception to the Court's main charge was necessary, the Court having been apprised in advance of the charge, of petitioner's request and its attention having been called to the omission, following the main charge (R. 725).

IV.

The exclusion by the Trial Court of Defendant's Exhibit A (R. 927, 928) is justified by respondent with the bald assertion that it could have no "bearing upon the question of intent * * * in view of the abundant evidence that the petitioner wilfully testified falsely * * *" (Br. 11).

This view, patently, begs the question. Petitioner was entitled to have the jury, not the Government, determine what, if any, bearing this document had "upon the question of intent."

> "Intent is a state of mind difficult of precise proof and, therefore, evidence of other and surrounding circumstances may be received for the purpose of proving such intent." *Shreve* v. *United States,* 103 Fed. (2nd) 769, 803.

> "Criminal intent is essential to constitute the crime, and the testimony bearing thereon is always a question for the jury. (Duffy v. People, 26 N. Y. 588-593; Stokes v. People, 53 N. Y. 164; People v. Powell, 63 N. Y. 88; People v. Flack, 125 N. Y. 324.)" *People* v. *Wiman,* 148 N. Y. 29, 33.

This Court, in *United States* v. *Norris,* 300 U. S. 564, 576, has plainly indicated that an effort to correct a mistake or to elaborate an incomplete answer may suffice to demonstrate the absence of a wilfull intent to swear falsely.

Since the letter in question was offered not as a self-serving document to prove the statements therein contained but rather to corroborate positive evidence already adduced and further as an offer to correct, it was prejudicial error to deprive the defendant of the right to present to the jury competent and relevant evidence bearing upon his defense.

V.

Respondent is content to reject the claim of petitioner that he was deprived of his constitutional right to a fair trial as a result of the cumulative effect of the improper and prejudicial cross examination of character and other witnesses, the admission of circumstantial evidence and testimony by inference which imputed to him the commission of other unrelated offenses, with the observation that petitioner "fails to point out the particular cross-examination and evidence of which he complains" (Res. Br. 12). Reference to petitioner's main brief (p. 3) clearly indicates the particular instances in the record to which the point in question alludes, viz., R. 293, 523-536, 569, 575 and 589-634.

To the claim of petitioner (Point IV, Br. 17) that he was entitled to a mistrial as a result of the conduct of Juror No. 4 which the Trial Court itself labelled "improper", the Government, without explanation or attempt at justification, suggests "that the admonitions of the Trial Judge corrected any possible prejudice" (Res. Br. 12).

Mindful that the incident occurred at the very outset of the trial so that the declaration of a mistrial at that point could work no hardship upon either side, and that in the absence of any showing by either side to demonstrate beyond question that the error complained of is prejudicial, it is respectfully urged that the defendant is entitled to a presumption that such error was prejudicial so as to require a reversal.

As was said in *Ah Fook Chang* v. *United States,* 91 Fed. (2nd) 805, 810:

> "Finally if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal."

A reading of the colloquy between Court and counsel (R. 268-275) demonstrates that the usefulness of the juror in question was entirely impaired and that at his hands the defendant could not obtain his constitutional right to a trial by an impartial jury.

Conclusion.

It is respectfully submitted that the Petition should be granted as prayed for.

Dated: New York, August 8th, 1940.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 116

JOSEPH J. MASCUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 989–991) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 15, 1940 (R. 991). The petition for a writ of certiorari was filed May 31, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

The only question properly presented by the petition for writ of certiorari is whether the evidence was sufficient to support the petitioner's conviction for perjury under each count of the indictment.[1]

STATUTE INVOLVED

Criminal Code, Section 125 (U. S. C., Title 18, Sec. 231), reads as follows:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.

STATEMENT

On June 14, 1939 (R. 3), an indictment in two counts was returned against the petitioner in the

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[1] This was the only question argued by the petitioner in his brief in the Circuit Court of Appeals and the only one upon which that court passed. However, the petitioner presents several other questions in his petition for writ of certiorari and brief in support. As they were not argued in the Circuit Court of Appeals, the petitioner is precluded from urging them in this Court. In any event, as indicated in the Argument, *infra*, pp. 9–12, these questions are clearly without merit.

District Court for the Southern District of New York (R. 6–11). The first count charged the petitioner with the offense of perjury while testifying, on or about April 12, 1939, before an officer of the Securities and Exchange Commission, to matters material in an investigation duly authorized by the Commission relative to trading operations in the common stock of Breeze Corporations, Inc., by the petitioner, one Douglas C. Hoff and one John Horshor. The count assigned as perjury that the petitioner testified (a) that he owned, both then and during the period he had been connected with Breeze Corporations, Inc., approximately 89,000 to 90,000 shares of its common stock, whereas he knew that at the times specified he owned in excess of such amount; (b) that he knew nothing about and had no connection with, except to guarantee, a brokerage account with the firm of Foster & Adams in the name of one Hazel B. Hoff, whereas he knew that he had loaned Breeze stock as collateral for this account prior to his guaranteeing of the account and had directed operations in trading in Breeze stock in that account; (c) that he did not know anyone named "Edward Van Horn", that the only "Van Horn" he knew was an engineer in Philadelphia and that "Edward Van Horn" was not an employee of Breeze Corporations, whereas he knew that "Edward Van Horn" was an alias used by one Edward Van Schoick, an employee of Breeze Corporations; and (d) that he did not think

that one John Horshor had anything to do with Breeze stock and that he had never had any business dealings with Horshor, or paid him any money, whereas he knew that he had instructed Horshor to trade in Breeze stock and had personally caused him to be hired as an employee by the corporation (R. 7–9). The second count charged the petitioner with the offense of perjury on or about April 13, 1939, while testifying in the investigation by the Securities and Exchange Commission referred to in count one. This count assigned as perjury that the petitioner testified (a) that he had never hired Horshor, whereas he knew that he had personally caused the Breeze Corporations to hire Horshor; (b) that he had no dealings whatsoever with one David Verrier regarding Breeze stock, whereas he knew that he had caused common stock of that corporation to be transferred into Verrier's name and had had dealings with him regarding such stock; and (c) that he had not, either by himself or with others, effected any transactions in Breeze stock from October 1, 1938, to April 13, 1939, whereas he knew that he had effected such transactions during that period. (R. 10–11.)

At the conclusion of the Government's case (R. 482–497), and again at the close of the entire case (R. 638–640), the petitioner moved to dismiss the indictment and for a directed verdict on the ground that the evidence was insufficient to establish the offenses charged. Both motions were overruled

and exceptions noted (R. 521, 640). A verdict was returned finding the petitioner guilty on both counts (R. 729), and he was sentenced to two years imprisonment and a $2,000 fine on each count, the sentences of imprisonment to run concurrently (R. 742, 935). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment of conviction was unanimously affirmed (R. 989–991).

ARGUMENT

1. The Petitioner contends (Br. 19) that where several assignments of perjury are included in a single count of an indictment and any one of these assignments is not supported by the evidence, a conviction on that count must be reversed.[2]

The rule urged by the petitioner is contrary to the general rule. In *Wharton's Criminal Law* (12th ed.) Vol. 2, Sec. 1567, it is stated that "All the several particulars, in which the prisoner swore falsely, may be embraced in one count, and proof of the falsity of any one will sustain the count."[3] This is the rule prevailing in the Federal courts. *United States* v. *Otto*, 54 F. (2d) 277, 279–280 (C. C. A. 2d); *Claiborne* v. *United States*, 77 F. (2d) 682, 691–692 (C. C. A. 8th); *Clayton* v. *United States*, 284 Fed. 537, 539 (C. C. A. 4th).

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[2] In this connection petitioner asserts that the evidence failed to prove assignment A of the first count and assignment C of the second count.

[3] See also Section 1582 and cases cited in footnote 20 thereof.

The New York decisions cited by the petitioner are not, of course, controlling in the Federal courts. Moreover, the only decision by the highest court of the State which the petitioner cites does not support his contention. *Wood* v. *People,* 59 N. Y. 117. The only question there decided was whether reversible error resulted because the trial court refused to withdraw from the consideration of the jury certain defective or unsustained assignments of perjury after its attention had been specifically directed thereto.[4] Indeed, in the later case of *Harris* v. *People,* 64 N. Y. 148, 153, the New York Court of Appeals followed the general rule.

Also, it should be pointed out, as was stated in the opinion of the Circuit Court of Appeals (R. 990), that petitioner's present contention was not urged in the trial court. He made no request that the jury be charged that it could not convict under either count unless it was convinced that all of the assignments of perjury charged in the count were proved (R. 700–706). On the contrary, by failing to object (R. 724–725) to the charge of the trial court, twice given (R. 719, 729), that it was unnecessary for the Government to prove all of its specifications of perjury in each count, he must be presumed to have acquiesced therein. As was said by the Circuit Court of Appeals (R. 990), "Trial

[4] As hereinafter pointed out (*infra*, pp. 7–9) the petitioner in the instant case did not move to withdraw any specific assignment of perjury from the jury's consideration.

errors will not ordinarily be reviewed on appeal unless called to the trial judge's attention in order to afford an opportunity for timely correction."

If, as we submit, the proof of one assignment of perjury in a particular count is sufficient to sustain that count, it is clear that the petitioner is not entitled to a reversal of his conviction on either count, since he does not argue that there existed a failure of proof as to all of the assignments of perjury in each count, but merely that a particular assignment in each count was not established. It is manifest from the opinion of the Circuit Court of Appeals that at least one assignment in each count was sufficiently proved.[5]

The petitioner further contends that the Circuit Court of Appeals erred in refusing to consider his general trial motions for a dismissal of

[5] The Circuit Court of Appeals said (R. 990): "That at least one assignment in each count was sufficiently proved is clear beyond peradventure of doubt. The appellant's brief does not even argue that the Verrier assignment in count two should not have been submitted to the jury. We think the Hoff assignment in count one was proved with equal completeness. After testifying that he had guaranteed the Hazel Hoff account he was asked to give in his own words a running story of what he knew about it from the very beginning. He replied that he didn't 'know a thing about it" except that the brokers asked him to guarantee it. In fact, it was proved that the account was opened by a deposit as collateral of 300 shares of the defendant's Breeze stock, which stood in another's name, and that he had a great deal to do with the account long before he executed the guarantee."

the indictment and for a directed verdict as requests for the withdrawal of specific assignments of perjury, with the result that he was deprived on appeal of the opportunity of establishing that the evidence failed to sustain assignment A of count one and assignment C of count two (Br. 19, 21–22).

It is apparent, however, from the petitioner's own description of his motions that they were not motions to withdraw from the consideration of the jury any specific assignment or assignments of perjury but were, in effect, general motions for a directed verdict since they sought, as the petitioner concedes, "the withdrawal from the jury's consideration of each and every specific assignment of perjury." (Br. 21.) The motion for a dismissal of the indictment and for a directed verdict made at the close of the Government's case specified ten grounds, which, so far as here pertinent, were directed only to the sufficiency of the evidence in general (R. 482–483), and in the argument thereon defense counsel did no more than review the evidence pertaining to each assignment and argue that it was insufficient to prove that assignment (R. 484–497). The motion made at the close of the entire case merely repeated the grounds of the prior motion (R. 638–640). No request was made to the trial court to withdraw from the jury's consideration any specific assignment of perjury, and there is nothing in the record to indicate that the trial judge considered the motions as being other

than the usual ones for a directed verdict because of insufficiency of evidence. It is elementary that where, as was said by the Circuit Court of Appeals (R. 990), a "restricted submission is desired, it must be requested and refused to be available as an error to be urged on appeal."

In any event, it is clear from the summary of the evidence contained in the trial court's charge to the jury (R. 711–718) that there was sufficient evidence to warrant the submission to that body of each assignment of perjury. The Circuit Court of Appeals, after considering all of the assignments, held that "The proof * * * showed the appellant [petitioner] to be guilty of perjury in respect to each of the assignments, or at least was sufficient to support such a finding by the jury" (R. 990–991).

2. The petitioner raises several contentions in his petition for writ of certiorari and supporting brief which he did not urge in the Circuit Court of Appeals.[6] They are, therefore, probably not open to review in this Court. See *Helvering* v. *Wood,* No. 384, 1939 Term, decided February 26, 1940. In any event, they are clearly devoid of merit.

(a) Petitioner urges (Br. 11–13) that the trial court erred in refusing to give his Requested Instruction No. 6 which, in the alternative, sought to have the jury charged either (1) that good character evidence when taken in connection with the other evidence, may be sufficient to raise a rea-

[6] See footnote 1, *supra*, p. 2.

sonable doubt as to a defendant's guilt, or (2) that such evidence of itself may create a reasonable doubt (R. 701).

However, in excepting to the alleged failure of the trial court to give this charge, counsel for the petitioner specifically requested an instruction in accordance with the second of the alternatives contained in his Requested Instruction No. 6. This the trial court refused to give on the ground that this alternative had been covered in his main charge to the jury. The portion of the charge (R. 721) quoted by petitioner (Br. 11–12) confirms this.[7]

(b) The petitioner also complains of the refusal of the trial court to give his Requested Instruction No. 31 to the effect that he should be acquitted if the jury found that he believed the examining officer of the Securities and Exchange Commission had agreed to allow him to correct his testimony and that he relied in good faith upon such agreement, even if the agreement did not in fact exist

[7] The petitioner's assertion (Br. 12) that "The Court's charge was tantamount to an instruction to the jury that evidence of good character must outweigh the positive evidence in the case before petitioner would be entitled to the benefit of the probative effect of evidence of his good character", is clearly without basis, since it is apparent from the quotation from the charge that all the trial court said was that the evidence of good character must be such "as to raise a doubt of the truth of the positive evidence." Moreover, petitioner neither excepted to the charge nor assigned error with respect thereto (R. 724–728, 939–983), and, consequently, he is not in a position now to complain thereof.

(Br. 13–15). This Requested Instruction was properly denied since, as the trial court said (R. 728), it had been covered in the general charge (see R. 723). It was, of course, not necessary that the precise language of the Requested Instruction be utilized in the charge.

(c) Defendant's Exhibit A, a letter written on May 26, 1939, by the attorney who represented him when he testified before the officer of the Securities and Exchange Commission, is claimed to have been erroneously excluded on the grounds that it corroborated the existence of the alleged agreement referred to above, and that it was an offer to correct the petitioner's testimony and, therefore, had a bearing upon the question of intent (Br. 15–17).

The letter in question (R. 927–928) stated that the petitioner refused to be bound by his testimony unless he were given an opportunity to examine the transcript for the purpose of making corrections, in accordance with the alleged agreement. It is obvious that the District Court properly rejected the letter as corroborative of the alleged agreement, since it was purely a self-serving declaration. Also, in view of the abundant evidence that the petitioner willfully testified falsely before the Commission's officer on April 12 and 13, 1939, this letter, written by his counsel some six weeks later, could clearly have had little, if any, bearing upon the question of intent.

(d) With respect to the petitioner's contention that the trial judge erroneously refused to grant a

mistrial because of a remark made by one of the jurors during the cross-examination of a Government witness (Br. 17–18), it is obvious that the admonitions of the trial judge corrected any possible prejudice (see R. 275).

(e) The petitioner also refers to allegedly improper cross-examination of various witnesses and to the admission of testimony imputing to him the commission of other offenses (Br. 22). However, he fails to point out the particular cross-examination and evidence of which he complains. The scope of the cross-examination was of course within the discretion of the trial court (*Dist. of Columbia* v. *Clawans,* 300 U. S. 617, 632; *Alford* v. *United States,* 282 U. S. 687, 694; *Blitz* v. *United States,* 153 U. S. 308, 312) and the petitioner has failed to make any showing that such discretion was abused.

CONCLUSION

The petitioner presents no question requiring review by this Court. We therefore respectfully submit that his petition should be denied.

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